SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1881. NO. 313.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

RUFUS WAPLES, PLAINTIFF IN ERROR,

vs.

MRS. ELIZABETH C. HAYS, NATURAL TUTRIX OF HER MINOR CHILDREN, JOHN HAYS, LUCY HAYS, KATE HAYS AND MINERVA HAYS.

BRIEF OF PLAINTIFF IN ERROR.

FACTS AND PLEADINGS.

This action was instituted by the defendants in error to recover three lots of ground, formerly the property of H. T. Hays, deceased. The facts are as follows:

In 1860, Hays borrowed $6,000 of E. A. Bradford, and executed a mortgage upon the three lots of ground in question, by

notarial act importing confession of judgment to secure the payment of the loan; pp. 23, 33.

In 1863, the lots were libelled as enemy property, (Act. July 17, 1862) by the United States [p. 18]. Bradford intervened November 27, 1863, [p. 22] in response to notice "to all persons interested or claiming an interest therein," before the judgment of condemnation in 1865, [p. 31] and a decree was rendered in his favor, February 23, 1865, [pp. 33, 34,] and his judgment was ranked superior to that of the United States, in the judgment of distribution [Additional Record, p. 3] and all the proceeds, (less costs, taxes, etc) were paid to him, [see his receipt, Additional Record p. 3] and none to the United States.

The price received at the sale was the full value of the three lots as assessed in 1861, 1862, 1863, 1864, 1865, [Additional Record pp. 3, 4, 5]. The mortgage of Bradford was duly erased [p. 37]. The plaintiff in error paid the price and received title [pp. 35, 36]. The case was never removed to an appellate court.

After the death H. T. Hays, his widow, tutrix of his children, brought this action, in 1877, to evict the purchaser. The petition [p. 1] does not conflict with the above statement; it admits that the lots were forfeited by Hays and decreed confiscate to the United States, and sold to the defendant below, and paid for by him, and that he came into lawful possession of said property, but avers that upon the death of said Hays, the heirs of the latter became by law entitled thereto. The petition contains no description of the land sued for, but refers to an authentic act of title for description, alleging it to be attached to the petition, though it was not attached nor filed with it.

The answer [p. 3] sets up the decrees of condemnation and mortgage foreclosure and the sale and title thereunder, the application of the price towards the satisfaction of the mortgage after the payment of other lien creditors who had obtained judgment against the *res* as intervenors, etc., and sets up the plea of *res adjudicata* based upon the decree of mortgage foreclosure and that of condemnation of the *res*, and denies the right of

collateral attack upon the judgment and the title acquired thereunder.

The exceptions to the action, [p. 9] filed by the defendant below, are: (1st) That the action should be dismissed because the heirs of Hays could not maintain it without first refunding the money which had been applied to the payment of the mortgage; and, (2nd) That defendant's title is quieted by virtue of ten years peaceable possession, etc.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns the following errors:

I.

(1) That, after having charged the jury that all the right, title and interest of Harry T. Hays in the property claimed for his heirs was forfeited to the United States and that "the United States acquired, subject to the mortgage of Bradford, just as Hays had held" [p. 39, §§ 1, 2,] the Court erred in refusing to charge, as requested, "that Bradford could, under the statute expressly authorizing it, intervene before the confiscation sale, and lose no rights thereby and was entitled to have the property sold in fee, since the mortgage debt covered the whole assessed value of the property." Bill of Ex. p. 39, § 4. And also in refusing to charge, as requested,

(2) "That Bradford's intervention, as authorized by the statute of March 3, 1863, [12 stat. L. 762] was a hypothecary action, a real action, whether the property mortgaged was in the hands of the mortgagor or of any third person, or of the United States; and the possessor must pay the debt or give up the property." Bill of Ex. p. 39, § 9.

II.

That the Court erred in refusing to charge, as requested,

(1) That the United States were "bound to exhaust the property in order to pay the mortgagee—the latter not being allowed to issue execution but obliged to look to the proceeds for the satisfaction of the mortgage." Bill of Ex., § 5, p. 39.

(2) "That the sale of the property to satisfy the judgment of Bradford, decreeing his claim to be superior to that of the United States, having proved insufficient to pay the mortgage, nothing was left in the United States to be conveyed by grant to the heirs of Hays." Bill of Ex., p. 39, § 6.

III.

That the Court erred in refusing to charge the jury, as requested,

(1) "That the heirs of Hays could not take by descent, since their father conveyed the property in 1860 to the amount of $6,000, which proved to be the full value, by mortgage importing confession of judgment, upon which judgment had been rendered and sale made and deed given; also because they aver, in their petition, that all their father's interest had been conveyed by forfeiture." "That plaintiffs cannot take both the land and the price—their father having received the full value in the $6,000 borrowed from Bradford;" p. 39, §§ 7, 8.

(2) That the Court erred in charging the jury that "upon his (Hays') death, the property descended to his heirs," and "that this would be true though the jury found that Mr. Bradford held a mortgage upon the property, and intervened in the confiscation case and was paid the amount of his mortgage, either wholly or in part;" "that if the jury find that the property at the time of the confiscation was the property in fee of the said Harry T. Hays, that he died prior to the institution of this suit, and that the plaintiffs were his heirs at law, then the verdict of the jury must be for the plaintiffs;" p. 40. Bill Ex, 3.

(3) The Court erred in refusing to charge that "one who pays a mortgage debt in a judicial proceeding has a right to be

subrogated to the rights of the holder of that debt and is so subrogated by such payment, and if Waples' money was used to pay Bradford's mortgage, he (Waples) became subrogated to the rights of Bradford;" p. 40. § 10.

IV.

That the Court erred in disregarding the exception filed in bar of the action, *to wit:* that the action should be dismissed for that the plaintiffs had not reimbursed the defendant in the sum of $6,000, which they admitted, in their petition, that defendant had paid, which sum had been applied to the payment of the said mortgage and tax liens; nor had they tendered repayment; that the error was first in relegating this preliminary exception to the trial upon the merits; and, secondly, in overruling said exception; p. 9.

V.

That the Court erred in admitting to the jury as evidence, the title deed of Hadden to Hays, and in overruling the following objections to its admission:

(1) "That the title is not sufficiently set forth in the petition, nor is it attached to the petition as required by the Code of Practice, Art 174 (although the petition recites that it is attached) and because the petition does not describe the land sued for. (Code of Practice, 173.)"

(2) "That H. T. Hays, having conveyed by mortgage, (importing confession of judgment) the right to sell to the amount of $6,000, with interest, etc., and the mortgage having been foreclosed as authorized by the Act of Congress, and the property having been exhausted to satisfy the mortgage, no title remained in Hays or his heirs."

(3) "That the plaintiffs claim property, in their petition alleged to have been forfeited to the United States."

(4) "That the plaintiffs sue upon an extinguished title."

Bill of Exception, No. 1, for defendant, p. 38.

VI.

That the Court erred in overruling the plea of *res adjudicata* based upon the judgment in favor of Bradford, and the same plea based upon the judgment in favor of the United States; from which judgments and sales thereunder the defendant derived his title, [Answer, pp. 5, 6] and in overruling the plea of prescription, [pp. 9, 10].

And that the verdict and judgment were contrary to law and evidence.

ARGUMENT.

We will follow the order of the assignment.

I.

THE LIEN-HOLDER'S RIGHT TO INTERVENE UPON HIS MORTGAGE AND TO HAVE JUDGMENT AGAINST THE PROPERTY.

The right of the mortgagee, Bradford, to intervene and claim the proceeds of the property on which his mortgage rested, was a statute right. The Act of March 3, 1863, "To protect liens, etc," United States Rev. Stat. § 5322; 12 Stat. at L. p. 762 expressly provided that when any property should be confiscated under the insurrectionary laws, "the Court rendering judgment of comdemnation shall, notwithstanding such condemnation, and before awarding such * * * *property*, or the proceeds thereof to the United States * * first provide for the payment" of such "claims as might be specifically enforced" against such property. Bradford duly appeared in response to notice and monition, and the Court decreed in his favor upon the exceptions filed against his intervention based upon the qualifications required by the Act (p. 26). He was adjudged to be entitled to intervene under the act, and the question of his right was put at issue and decided in his favor and is now no longer open. Thus judici-

ally recognized, he did intervene, did establish his claim contradictorily with the United States and all appearers, and obtained judgment.

He was obliged to appear in response to the motion, or he would have been defaulted. Even had he been an owner of one of the lots composing the *res*, he would have been "remediless" had he not intervened. *Semmes* vs. *U. S.*, 91 U. S. 21. His right to appear when, and as he did, cannot now be questioned, since the action of the District Court thereon is final—the case never having been removed by writ of error.

His judgment is also past inquiry; and that, as a judgment creditor, his right to have his judgment executed by having the property sold upon which his mortgage rested to the amount of its full assessed value, should not be charged by the Court in this collateral case, when requested, seems to us fatal error.

The right of lien-holders to appear, under the Act to Protect Liens, and intervene in response to monition, when property is proceeded against by the government under the Insurrectionary Laws, had been held by the Supreme Court. The Sallie Magee, 3 Wal. 451. The Hampton, 5 Wal. 375.

The real, hypothecary character of the action, and the duty of the possessor of the *res* upon which rested the *jus ad rem*, to relieve the indebted thing of its debt by payment, or to give up that thing, seem proper subjects for the judicial charge to the jury. Certainly they were pertinent to the issue, since the Court had already charged that the United States held the realty subject to the mortgage, "as Hays had held." The foreclosure, under the Act of Congress, was no less a hypothecary action than it would have been under State law. The primary responsibility of the property was the same under either. The debt was not an ordinary, but a mortgage debt; not the debt of Hays only, but of the property. And it followed the property till payment, so far as its proceeds could pay.

The mortgage *in fee* covered the whole assessed value of the property. The right of Bradford to collect his debt was indisputable; and Congress could not divest him of it without giving him an opportunity to assert it. The only opportunity possible was by way of intervention, when the mortgaged land was proceeded against, since the law of notice and default precluded any subsequent action by him. Whether or not any other remedy was possible, it is certain that this was the remedy selected by Congress. Whether the District Court, which entertained the intervention and gave Bradford judgment, erred or not, it is certain that the statute gave jurisdiction, and that there can be no review of that judgment in this collateral case, since it is not attacked upon grounds of fraud, or of want of, or excess of jurisdiction.

With this judgment in his favor, the judgment creditor Bradford, having his rank judicially recognized as superior to that of the United States, pursuant to the requirement of the act, had the right to make his money, though he could not issue execution. He was bound to look to the proceeds only—the proceeds of that upon which his mortgage rested. He was obliged to stand still and let the seizing libellants sell for him, as his agent to the extent of the debt due him. "The creditor whose pledge is seized and offered for sale at the suit of another, would not have the right to oppose that sale and to preserve his pledge in kind. His right is that of being paid out of the proceeds." *Alexander* vs. *Jacob*, 5 *Martin's (La.) Rep.* 634. "The proceeds stood in the place of the real estate, and the same preference was retained on it." *Crum* vs. *Laidlaw*, 10 *Ib.* 468. *Chipella* vs. *Launsse*, *Id.*, 448. "One holding a prior mortgage cannot prevent the sale of the mortgaged property at the suit of a subsequent mortgagee. He must exercise his right on the proceeds." Conrad vs. Prieur, 5 Rob. (La.) 55. Tyler vs. His Creditors, 9 *Id*, 373. Florence vs. Orleans Nav. Co., 1 *Id.* 224. Fulton vs. Fulton, 7 *Id.* 73. City Bank of N. O., vs. McIntyre, 8 *Id.* 467. Bloodworth vs. Hunter, 9 *Id.* 256. Joice vs. Poydras De La Lande, 6 La. 283. Herbert's Heirs vs. Babin, 6 Martin (N. S.) 614. Casson vs. Louis St. Bank, 7 *Id.*

281. Rowley vs Kemp, 2 Ann. (La.) 360. Code of Practice, (La.) Arts, 401, 402, 403.

But, though the judgment creditor upon prior mortgage cannot sell, his right to have the mortgage property sold is such that, were the seizing party not a sovereign person, he could compel sale by such party. He would be entitled to *mandamus* for the purpose—so certain is it the duty of the latter to sell for him, in his interest, and as an indispensable preliminary to the enjoyment of any rights under his own judgment. The seizing party sells as agent or *negotiorum gestor* for the party first in interest; and this *ex necessitate rei.*

If the *jus ad rem* held by the second mortgagee, should amount only to one-tenth the value of the land, while that of the first mortgagee should amount to the full value, the second mortgagee, as seizing creditor, must sell the whole land, with *title in fee*, to satisfy the first mortgagee. If the United States by a confiscation decree, become entitled to sell only a life-interest in land, that right is *jus ad rem* only; it is a right *in* the thing—not *to* the thing. But. even in such case, they must sell the fee, where there is a *jus ad rem* adjudged to be prior and superior to that of the United States, resting on the land as a lien *in fee*, as Bradford's mortgage rested. In such case, the land itself must be sold.

II.

THE PROPERTY WAS WHOLLY BOUND BY THE MORTGAGE JUDGMENT.

The duty of the United States to exhaust the property in order to pay the mortgage, is correlative with the right of Bradford to have it so exhausted. U. S. vs Hawkins, 4 N. S. (Martin La.) 317; Thelusen vs Smith, 2 Wheat. 426; Parsons vs Wells, 17 Mass. 425. The payment of the superior claim, with its rank judicially assigned, under the statute of 1863, was the libellant's first duty. The payment of the prior creditor was the condition precedent to the enjoyment of any rights of property by the libellants; it was the *sine qua non* of their

judgment right. And they were bound to sell the property—not less than the property; they could not sell a part to pay the mortgage in part, when the mortgage covered the whole, and when the exhaustion of the whole was necessary to satisfy the judgment-creditor.

Pepper vs Dunlap, 16 La. 163, 169 Civil Code, 3249; Florence vs Orleans Nav. Co., 1 Rob. 224; Moore vs Allain, 10 La. 496; Elwyn vs Jackson, 14 La. 411; Adams vs Sears, 3 La. Ann. 144.

"Each and every portion of the property mortgaged is liable for each and every portion of the mortgage debt. The mortgage is *iota in toto, et tota in qualibet parte.*" Bagley vs Tate, 10 Rob. 45.

The Judge *a quo* charged the jury that the United States acquired the lots "subject to the mortgage, just as Hays had held." The possession was not adverse but under the mortgage. The libellants could not set up such adverse possession as would defeat the lien of the judgment-mortgage creditor. Bank of La. vs. Stafford, 12 How. 341. For "the hypothecary action is a proceeding *in rem*, and the third possessor must pay the debt or give up the property." Moore vs Allain, 10 La. 496. "It is a real action, whether the property mortgaged is in the hands of the mortgagor or of a third person." Elwyn vs Jackson, 14 La. 411.

After the decree of condemnation, nothing was left in Hays. Wallack vs Van Riswick, 92 U. S. 202; Pike vs Wassal, 94 *Id.* 711; French vs Wade, 102 *Id.* 132. There was no excess of jurisdiction when all was taken from him, as formerly held by a case, Bigelow vs Forrest, 9 Wal. 339., overruled on this point by those just cited. The fee became vested "either in the United States or the purchaser." (*Above cases.*) For the time between condemnation and sale, therefore it was in the United States. But the United States held subject to Bradford's mortgage *in fee*, "just as Hays had held;" and this mortgage had been adjudged superior to the rights of the libellants, and the statute required that it should be satisfied

before the *property* or its proceeds shall be awarded to the libellants. The sale, therefore, was by Bradford through the United States, or by the latter for the former, by virtue of a statute posterior to the "Joint Resolution Explanatory" of the Act of 1862. Therefore, if that resolution limits sale, this statute of 1863 governing Bradford's case, amends and supersedes it. For his claim was one that "could have been specifically enforced" by the laws of the State, such as the statute of 1863 required to be satisfied out of the proceeds of confiscated property; satisfied wholly, to the exhaustion of such property if necessary; satisfied out of the *fee* where the mortgage was in fee.

Had the libellants, (now vested with all that Hays had had) sold only the usufruct of the lots for an uncertain time, by which not more than one-tenth of the price really realized would have been bidden at the sale, it is certain that Bradford's judgment upon his mortgage, (since he was not defaulted) would have been entitled to a further order of sale to bring into Court the proceeds of that upon which his mortgage rested. But these points are not open here for review, since a Court having jurisdiction of the subject matter, and also jurisdiction to sell and to make all necessary orders to effect the transfer of title to the property, (Sec. 8, Act. 1862, 12 Stat. 591) did "first provide for the payment" of the mortgage, "out of the proceeds of the * * *property*," as authorized and required by the Act of 1863; (U. S. Rev. Stat. Sec. 5322); and, had there been error in that Court's decree of condemnation, judgment upon the intervention with rank superior to the United States awarded, order of sale, confirmation of sale, distribution of proceeds to the mortgagor and other holders of liens *in fee* (such as the state and city for taxes), such error could be inquired into only by writ of error in that case.

III.

THE PROPERTY HAD BEEN CONTINGENTLY ALIENATED BY THE PLAINTIFF'S FATHER FOR A PRICE, WHEN HE MORTGAGED IT; AND HIS HEIRS CANNOT INHERIT WHAT HE HAD CONVEYED.

There is no dispute, between the parties in this case, of the fact that Hays alienated his lots by notarial act, in 1860, to the

amount of $6,000. (Bradford's petitions, pp. 23, 33; judgment thereon, p. 33; Receipt, p. 32; Receipt of money by Bradford, Additional Record, p. 3).

The Court charged that "mortgage is a species of alienation; it is an alienation of a right on the property"—p. 39.

The sum proved to be the full appraised value, (see tax bills in evidence, Additional Record, pp. 4, 5); and the full saleable value, (p. 35).

The act of mortgage imported confession of judgment to that amount; and Hays, representing his legal heirs as well as himself, made this alienation and received the stipulated price therefor, from Bradford, in 1860. The transaction was sealed by final judgment, (p. 33) and the lots were conveyed thereunder in consideration of their price, for the purpose of reimbursing Bradford.

Under these circumstances, should not the judge *a quo* have charged, as requested by the defendant's counsal, "that the heirs of Hays could not take by descent"—that they could "not take both the land and the price?" Their father had had the price and they were the heirs of that price; were they also the heirs of that which had brought the price?

They themselves aver, in their petition in this case now at bar, that their father's title was conveyed from him by forfeiture. How then can they be heard in the capacity of inheritors? *Heredibus nihil aliud est, quam successio in universam jus, quod defunctus habuerit.*

The Court not only refused this requested charge, but instructed the jury that if they believed the plaintiffs to be their father's heirs at law, and that the father owned the property in fee at the time of the confiscation, "the property descended from Hays to his heirs even if they should find that Bradford had a mortgage, had intervened, and had been paid out of the proceeds of sale!" In other words, though the property had

been exhausted to execute a contract made by the father, his heirs at law could yet take it by descent! It would seem that a mortgage *in fee* could not be vindicated against that upon which it rests, by judgment and sale of a mortgaged thing, and yet leave that thing in the hands of a mortgagor, as his property, to be transmitted to heirs, any more than a thing can occupy two places at the same time.

There is no decision that sustains the Judge's charge. The cases of Wallach, Pike and French (before cited), hold that confiscated property under the act of 1862 and the resolution, is wholly condemned, so that nothing is left in the enemy; and though those decisions also treat of sales, they were not sales where a mortgage had been allowed. Here the Judge held that a sale to vindicate a mortgage *in fee* (under final judgment not reviewable), and the application of the proceeds of the sale to pay the mortgagee, did not preclude the heirs at law of the mortgagor from inheriting the alienated property.

Bigelow vs Forrest is not authority for the Judge, since the cases just mention overrule it on the point that condemnation of all the enemy owned is excess of jurisdiction. That case cannot, any more than the others, be invoked to sustain the position that property may be sold and conveyed in vindication of a specific lien, (by virtue of a statute *later* than the Act of 1862 and the joint resolution), yet leave it unsold and unconveyed.

Did those decisions go so far, it would yet remain that the heirs of Hays, in getting the land, could not retain the price received for it; for, reception by their father is the same as reception by them, since *hæres est eadem persona cum antecessore.* The Judge was therefore seemingly in error when he refused the requested charge that one who pays a mortgage debt in a judicial proceeding is subrogated to the rights of the holder of the debt, and that if the defendant's money was used to pay Bradford's mortgage, he became subrogated to the rights of Bradford.

This is positive law in Louisian, the *lex rei sitæ*. The subrogation is *by effect of law*. C. C. 2161 [2157].

IV.

THE PLAINTIFFS CANNOT RECOVER THE LAND BEFORE REFUNDING THE MONEY PAID ON THEIR MORTGAGE.

This refusal to charge the law of subrogation, brings us to the consideration of the exception filed to the plaintiffs action, that they could not be allowed to prosecute it without first tendering to the defendant the price, which they admitted, in their petition, that he had paid; and which had been applied to their benefit, (if they were indeed the inheritors of the property) by clearing it of the mortgage and other liens that had been upon it.

The error of the Court is assigned as being (1) in relegating this preliminary exception to the trial upon the merits; and (2) in overruling it.

The *lex rei sitæ* is so settled upon this subject that we need only cite it. It holds the tender, or payment, to be a pre-requisite to further proceedings. The money must be deposited in Court for account of whom it may concern, in case it be refused. Hays had lost nothing by having his mortgage debt paid by the land he had mortgaged: and since he could not have both land and price, his heirs at law cannot derive from him any better position. Since he would have been obliged to return his borrowed money before he could get his land free, his children must do so.

The authorities will be found conclusive. Elliott vs. Labarre, 3 La. 554. Barelli vs. Gauche, 24 Ann. 324. Gormley vs. Palms, 13 Ann. 213. Dearmond vs. Courtney, 12 Ann. 251. Brown vs. Bouny, 30 Ann. 174. Coulson vs. Wells, 21 Ann. 383-5. Latham vs. Hickey, *Id.* 425. Blake vs. Nelson, 29 Ann. 245, 255. Donaldson vs. Rouzan, 8 N. S. 162, 181. Andrews vs. Ackerman, *Id.* 205.

One cannot complain of the payment of admitted debts through judicial process obtained upon constructive notice. McQuiddy vs. Ware, 20 Wal. 14. The heirs cannot complain that their father's debts have been paid by their father's property; and, if they seek to regain that property, they must pay such debts, either to the original creditor or to one who has paid him, for heirs are but the continuance of the ancestor; an heir is another self, and a son is a part of the father. *Heres est alter ipse, et filius est pars patris.* No change of ownership, from ancestor to heir, can escape the property obligations of the inheritance.

The mortgage-debt was the property-obligation of Hays' lots; and his heirs, finding these lots in the hands of one who paid the debt in a judicial proceeding, come precisely under the rule of the authorities above cited—to which may be added Gay vs Ahor, 102 U. S. 79; Petty vs Clark, 5 Pet. 481; Valle's Heirs vs Flemming's Heirs, 29 Mo., 152; Shoyer vs Nickell, 55 Mo. 269; Evans vs Snyder, 64 Mo. 516; Howard vs North, 5 Tex. 315.

V.

THE TITIE OF THE DEFENDANTS IN ERROR HAD BEEN EXTINGLISHED, AND WAS INADMISSABLE IN EVIDENCE UNDER THEIR OWN PLEADINGS.

On the trial, when the heirs offered their father's title deed in evidence, it was objected to: (1) Because it had not been set forth in the petition; and was not attached thereto as the law of the State required; and the lots were not described in the petition, as required, (p. 38).

This was overruled, though the Code of Practice of Louisiana is condusive in support of the objections. Article 173 requires that land be described in the petition, when it is the subject of the suit; and Art. 174 requires that the title deed be attached to the petition.

The description is "three certain lots of ground, with the buildings thereon," * * * * "more specifically set forth in the said act of sale, a copy of which, marked Exhibit B., is annexed and made part hereof." But the copy was *not* annexed, nor the act, nor anything descriptive, as the statute law of the Code of Practice positively required.

Public policy underlies the law requiring certainty of description in pleadings involving title to real estate. Three more uncertain lots than these could hardly be imagined. No boundaries are given; the numbers of the lots are withheld; no street is designated as that upon which they are situated; no city plan is referred to; nothing is given by way of description that would not apply to any three lots in the city of New Orleans.

This fatal defect of pleading, in an action to recover real estate, is not relieved by reference to the court in which it had been condemned; for there is error in the name of the court itself. Had the court been rightly named, the description would still have been insufficient. The record was not attached to the petition, so as to cure this defect.

This brings us to the other objections to the admission of the title deed in evidence: that it was an extinguishable title, by the plaintiffs' own admission, in their petition. For they say that "The object of said suit was to have the said three lots and buildings thereon and interest of Hays in the same declared forfeited and confiscated to the United States as enemy's property; *that the object of said suit was obtained;*" "That on the 18th day of January, 1865, a judgment in said suit was rendered in favor of the United States, decreeing said three lots and the buildings thereon, and all the interest of said Hays therein, forfeited and confiscated to the United States." And then they aver the sale to defendant, not of any life estate or limited interest, but "*the said three lots, etc.,*" for the price of $6,000, adding that he, the defendant herein, "thereby became the owner of all the rights and interests in said three

lots etc., which were conveyed to him by said sale and adjudication."

Could the fact that Hays' title from Hadden had been extinguished, be more positively set forth, than is here stated, admitted, even pleaded by the plaintiffs themselves?

The subsequent averments, as to the effect of the death of their ancestor upon the alleged judicial sale of the land, are statements of their views of the law—not averments of fact; and therefore they do not relieve the petition from its positive recital that the title had passed. Even were they averments of facts, what right has a pleader to be contradictory in his facts? What right has a pleader to explain away one averment by making a counter averment?

Under this petition, they offered in evidence the extinguished title deed from Hadden. We submit that, upon their own pleadings it should have been excluded.

Beyond their admissions, there was the objection made and overruled, that no title remained in Hays, because his title had gone to satisfy Bradford's mortgage, as the record of the confiscation showed, which record was before the Court. We have sufficiently noticed this point elsewhere, but now urge it as an additional reason why the title should have been excluded from evidence.

VI.

RES JUDICATA.

Defendant, in his answer, (p. 5), pleaded that "it was ordered, adjudged and decreed that there be judgment in favor of the intervenor, E. A. Bradford, for the sum of $6,000 with interest, etc., with special mortgage upon the three lots, etc.," and that the judgment is "final and not reviewable, nor can it be attacked in any collateral action."

And he pleaded further, (pp. 4, 5) that it was also "ordered, adjudged and decreed that all of said property named and de-

scribed in said libel, be condemned and forfeited to the United States, and that said property be sold, and the proceeds thereof distributed according to law." Judgment in favor of Bradford, p. 33. Judgment of condemnation and sale, p. 31.

Both these judgments sustain the plea of *res judicata*. The defendant rightfully pleads them, since his title grows out of them, and he, as purchaser, was not bound to look beyond the decrees of condemnation, subsequent foreclosure, order of sale, and the decree of confirmation of sale by distribution of the proceeds.

The decree upon the intervention of Bradford, differs from that upon the intervention of Marcuard, in 20th Wal. 114, in this: the latter was before your honors by writ of error while Bradford's judgment is not. The difference is wide—it is infinite; for Marcuard's dismissal by the lower Court was reviewable, while Bradford's judgment is not. Jurisdiction has been exhausted in Bradford's case, since a Court vested with jurisdiction over the subject matter, finally decided sixteen years ago; and there is now no tribunal that can again hear and determine the issues then decided.

Besides, Marcuard's case is not in point as precedent; for the District Court had dismissed his intervention on the ground that he had aided the enemy Slidell by the loan, and therefore had not brought himself within the "Act to protect liens, etc.;" the Circuit Court affirmed the judgment, and the Supreme Court affirmed it—not dismissing by way of non-suit, (as the reasoning would seem to indicate) but unqualifiedly affirming the judgment. It will be seen therefore that the reasoning does not apply, and that it is out of accord with the opinion in the body of the case wherein the doctrine of monition, (inviting intervenors) and of default, (condemning them if not appearing) is fully held. Nor is it in accord with the doctrine of the main case, that the condemnation was of property because it was enemy property of a designated class, not a particular enemy's property, since it was held that the name of Slidell need not

have been used at all except by way of property description. The Confiscation Cases, 20 Wall. 105.

Nor is the case of Day vs. Micou, (18 Wall. 156, cited to sustain the Marcuard case) here in point: For there the mortgagor had not appeared as authorized by the *Act to Protect Liens*, but had been defaulted; here Bradford appeared in response to notice, as so authoized. Marcuard sought to intervene, but was denied because he had not brought himself within the Act; Micou did not respond; Bradford appeared and had final judgment on his mortgage.

That this final judgment and sale conveyed the propery, and that the Court had jurisdiction to foreclose the mortgage *in fee* and sell accordingly, is certain from legislation subsequent to the "Act to suppress Insurrection" etc., and to the "Joint Resolution Explanatory," of even date.

"The Court rendering judgment of condemnation, shall, notwithstanding such condemation, and before awarding * * the property or the proceeds thereof, to the United States, or to any informer, first provide for the payment out of the proceeds * * of any *bona fide* claims which shall be filed by any loyal citizen, etc., * * *interven*ing in such proceeding." * * *Approved March* 3, 1863. XII U. S. Stat. 762. U. S. vs Semmes, 1 Otto, 21. The Sallie Magee, 3 Wall. 451; The Hampton, 5 Wall. 375; U. S. Rev. Stat. § 5322.

The right to adjudge the intervention follows from this statute authorization for the interventions, and their payment out of the proceeds of condemned hostile property. The right to intervene, however, is confined to such claims as might have been specifically enforced against such ship, vessel or other property, in any loyal State wherein such claim arose. Whether Bradford's intervention upon his mortgage was such a claim, was put to the test by exceptions which were overruled in due course, and they cannot be re-opened or reconsidered now, (pp. 26, 27).

Bradford's right to intervene therefore, is finally settled. His right to intervene on a claim susceptible of being specifically enforced against the confiscated property, is settled. His right to forclose his mortgage *in fee*, is settled. And, the right of selling the property, to effectuate the judgment, follows as a corollary, even if the statute cited did not so ordain.

That the decree of condemnation was *res judicata* too, there can be no doubt; but, whether the fee of the land could have been sold, in case there had been no subsequent judgment upon the mortgage that might have been specifically enforced by State law ordinarily, we need not now enquire; since it is certain that, *with* such lien *in fee* adjudged against the lots upon statute authority, sale of the fee must necessarily follow to obtained those proceeds which the *property debt* must bring into court, *to-wit*, the proceeds of the property sold with fee simple title.

We submit that the court *a quo* erred in failing to sustain the plea of *res judicata*.

Jurisdiction to foreclose such mortgage is conferred on "the Court rendering judgment of condemnation." Act of 1863, XII Stat. 762. And that is the U. S. District Court. Act of 1862. XII Stat. at L. sec. 8, p. 591.

The purchaser was not bound to look beyond such decree, and sale thereunder in effectuation thereof.

Voorhies vs Bank U. S. 10 Pet. 449. Grignon's Lessee vs Astor, 2 How. 341. Foulke vs Zimmerman, 14 Wall. 113. McNutt vs Turner, 15 Wall. 365.

The decree was *res judicata quo ad omnes*.

VII.

PRESCRIPTION.

Whether the plea of prescription should have been sustained, depends upon the soundness of the foregoing argument. If it has been established that the Court could not award the *property*

to the United States, nor its proceeds, till the mortgage and taxes, (all liens *in fee* on the property) had been satisfied; and that, under these circumstances, the libellants could not reserve the property in fee for the heirs of the mortgagor and tax debtor, it follows that what was sold was bought by the defendant. At the time of the institution of this ejectment suit, he had, for more than ten years, held the property in peaceible, public, unequivocal and uninterrupted possession under a title legal, just, and translative of property, valid in form, acquired in good faith, for valid consideration, such as the code required as the basis of prescription. The plaintiffs, in their petition, aver that he thus acquired, and at the time stated, and had held for the required time. (See their petition, p. 2. Plea of prescription, p. 9).

VIII.

OBJECTION ANSWERED.

The only objection urged against this argument is based upon the "Joint Resolution Explanatory," (12 Stat. at L. 627). If it be conceded that what purports to be "explanatory" is *enactory;* that a statute held to be not ambiguous, (Wallack vs. Van Riswick, 92 U. S. 202), may be *explained* by Congress, after the passage of the Act, and contrary to the explanation made in the debates at the time of the passage, (Cong. Globe, Part IV, 37 Cong. 2 Sess. p. 3384, showing that the resolution referred to the "punishment and proceedings" which "work forfeiture" of the "real and personal estate" of the "offenders" convicted of the crime of treason, by the unlimited fine prescribed in the first four or criminal sections of the Act, which, as shown in Miller vs. The United States, 11 Wall. 309, are totally distinct from the second four, or confiscation sections—the case of Miller being expressly re-affirmed in the Wallach decision); if it be further conceded that the legislative exposition has all the force of a statute *proviso;* that while it purports to explain forfeiture it is referable to sale, and *limits the sale* of enemy property condemned under proceeding *in rem* similar to those in "admiralty and revenue cases" (as the statute requires), though

such *condemnation* is held absolute and unqualified, and translative of the property from the enemy owner, (Wallach vs. Van Riswick, 92 U. S. 202; Pike vs. Wassel, 94 *Id.* 711; French vs. Wade, 102 *Id.* 132); still the objection drawn from that resolution is inapplicable to the foregoing argument.

The marked difference between the case at bar and those mentioned is that in it the property was not awarded to the United States except in the qualified manner prescribed by the statute of 1863; the "new title from forfeiture" could not be confirmed to the libellants until those holding liens that could be specifically enforced by the law of the State had been satisfied to the full capacity of the *res;* the District Court's jurisdiction to sell, amply and clearly conferred by sec. 8 of the Act of 1862, was qualified by the Act of 1863 in this respect; the amendment is later than the resolution or *proviso;* the Court would have exceeded its jurisdiction had it awarded the *property* to the United States to be held for the mortgagor's heirs with the mortgagee unpaid.

As a test: could the libellants have retained the property in this case for refugees and freedmen, under the Act of 1865, which authorized such retention of any confiscated property, to be rented and afterwards sold at private sale? (Act March 3, 1865, 13 Stat. L. 507).

As the Court did not and could not, in the final confirmatory judgment of distribution, "award the property or its proceeds to the United States," it follows that the United States could not possibly retain the property for the mortgagor's heirs.

If the foregoing propositions be true, it follows that the verdict of the jury and the judgment thereon, were contrary to law and evidence, and to the prejudice of the defendant; and that the decree ought to be reversed, and judgment rendered in accordance with the prayer of his petition.

Respectfully submitted,

CHARLES W. HORNOR,
Of Counsel.
RUFUS WAPLES, p. p.

SUPREME COURT U.S.
FILED
OCT 9 1882
JAMES H. McKENNEY, CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 313.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF LOUISIANA.

RUFUS WAPLES, PLAINTIFF IN ERROR,

versus

MRS. ELIZABETH C. HAYS, NATURAL TUTRIX OF HER MINOR CHILDREN, JOHN HAYS, LUCY HAYS, KATE HAYS AND MINERVA HAYS.

Brief for Defendant in Error.

B. F. JONAS,
R. T. MERRICK,
Of Counsel.

A. W. Hyatt, Print, 73 Camp St., N. O.—23,257

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MRS. ELIZABETH C. HAYS, NATURAL TUTRIX OF HER MINOR CHILDREN, JOHN HAYS, LUCY HAYS, KATE HAYS AND MINERVA HAYS.

Brief for Defendant in Error.

This action was instituted by the defendant in error, as Tutrix of the minor children of the late Harry T. Hays, to recover three lots of ground, with the improvements thereon, which were forfeited and confiscated to the United States, and sold under a judgment of forfeiture rendered by the United States District Court, for the District of Louisiana, against the property of Hays, who was at that time engaged in the rebellion against the United States.

Hays died in New Orleans, on the 21st day of August, 1876, leaving four minor children, who are his only heirs, and who are represented herein by their mother, who is their duly qualified Tutrix.

The suit was instituted in the Fifth District Court of New Orleans, against Rufus Waples, who was the purchaser of the property condemned and sold, and has continued since in its possession, and was removed into the United States Circuit Court on his motion, upon the 31st day of December, 1878.

It will appear from the evidence in the record, that Harry

T. Hays purchased from David Hadden, on the 3d day of May, 1854, by act of sale before Poole, Notary Public, three certain lots of ground, with all the buildings thereon, for the sum of ten thousand dollars, and that he continued in the possession and ownership of the same up to the 3d day of March, 1865.

(See petition, page 1, Rec.; act of sale, Hadden to Hays, page 14, Rec.; Marshal's seizure and sale, pages 31 and 32, Rec.; certificate Register of Conveyances, page 35, Rec.)

On the 7th day of August, 1863, this property was libeled by the United States as enemies' property, in the District Court of the United States, for the Eastern District of Louisiana, under the allegation that Harry T. Hays, the owner thereof, "did give aid and comfort to the rebellion against the United States, and did assist such rebellion," etc., etc.

(See libel of information, page 18, Record.)

The property, after due proceedings, was condemned by decree, signed January 23d, 1865 (See Record, page 31), and sold to Rufus Waples, the plaintiff in error, by the Marshal, in execution of said decree, on the 16th day of March, 1865, for the sum of six thousand dollars. (See Record, page 32.)

(See, also, Marshal's deed to Waples, page 35, Record.)

The certificate of the Recorder of Births and Deaths, of the Parish of Orleans, shows that General Hays died on the 21st day of August, 1876. (Record, page 17.)

These being the undisputed facts in the Record, one can hardly understand why the case should have been brought into this court by writ of error, for certainly it has been frequently and finally adjudicated, that a judgment of condemnation of a rebel's property only forfeited the life interest of the owner, leaving the fee in his legal heirs, to be recovered after his death.

9 Wallace, p. 349; 11 Wallace, 208; 18 Wallace, 156; 20 Wallace, 92, 114, 475; 2 Otto, 212; 4 Otto, 711.

But it seems there was a mortgage existing upon the property condemned, and that the mortgagee intervened in the confis-

cation proceedings, and was awarded the net proceeds of the sale, and from this circumstance counsel for plaintiff in error seek to draw distinctions which are entirely fanciful and without weight, and might, without disrespect, be termed absurd.

On the 27th November, 1863, several months after the property was libelled, E. A. Bradford, the holder of a note made by Harry T. Hays for $6000, and secured by mortgage on said property, intervened in the libel suit, claiming a privilege (lien), and praying that the proceeds of the "confiscated property" be applied to the payment of his claim, with interest, charges, etc. (Pages 22 and 23, Record.)

A party named Cook, claiming a lien, also intervened, and the State of Louisiana filed an intervention for taxes.

As already stated, the court rendered a final decree, adjudging the lots to be condemned, and forfeited the same to the United States, on the 18th of January, 1865.

That there may be no doubt as to the purport and effect of that decree, we herewith incorporate it, and the order of sale issued thereunder, as a part of this brief:

"JUDGMENT OF CONDEMNATION.

"JANUARY 18, 1865.

"And the monition issued in this cause having been heretofore returned, and the usual proclamation having been made, and the default of all persons entered,

"It is therefore, on motion of R. Waples, Esq., United States District Attorney, ordered, sentenced, and decreed, by the court now here and his Honor the District Judge, by virtue of the power and authority in him vested, doth hereby order, sentence, and decree, that the three lots of ground with the buildings and improvements thereon, property of Harry T. Hays, a full description whereof is contained in the libel of information on file in this case, are hereby condemned as forfeited to the United States."

"ORDER OF SALE.

"And upon like motion it is further ordered and decreed that the clerk of this court issue a writ of *venditoni exponas* to the Marshal of the district, returnable on or before the twenty-third of February, 1865, and that upon the return thereof the proceeds be distributed according to law, the rights of the intervenors to the proceeds being reserved for further action hereafter."

See Judgment Book, page 213.

On the twenty third of January, 1865, under and by virtue of the foregoing judgment, a writ of *venditioni exponas* issued, commanding the Marshal to sell said three lots at public auction, on the third of March thereafter, to the highest bidder. *See the writ itself, on file, as part of the evidence herein.*

On the twenty third of February, 1865, more than a month after the United States, by the decree of condemnation, had become the owner of General Hays's interest in the lots, and just one month after the order to sell the property had issued, the court rendered a judgment on the interventions of *Bradford, Cook*, the *City of New Orleans*, and the *State of Louisiana*.

That judgment reads as follows:

"JUDGMENT ON THE INTERVENTIONS OF E. A. BRADFORD ET AL.

"FEBRUARY 23, 1865.

"When, after hearing the pleadings, evidence, and argument, the court being satisfied that the intervenor, E. A. Bradford, has fully made out his case, it is ordered, adjudged, and decreed that there be judgment in his favor for the sum of six thousand dollars, and five per cent. attorney's fees, and eight per cent. interest thereon from the third of July, 1862, till paid, with special mortgage upon the three lots of ground, with all the buildings and improvements thereon, designated as lots Nos. 25, 26, and 27, of square bounded by Chestnut, Camp, First and Philip streets, more fully described in the libel and act of mortgage on file.

"It is further ordered that the intervention of George Cook, being an ordinary claim, without any lien upon the libeled property, be dismissed with costs.

"It is further ordered that the taxes due the State of Louisiana and City of New Orleans be paid out of the proceeds, and that the costs and charges be taxed according to law. The intervenor, Bradford, paying his share of the same."

See Judgment Book, page 293.

On the third of March, 1865, under and by virtue of the said writ of *venditioni exponas*, the United States Marshal put up the condemned property at auction, and it was adjudicated to Rufus Waples, the defendant, for the sum of $6000.

On the seventeenth of March, 1865, the said sum of $6000 was paid over by the Marshal to *Charles Claiborne*, Clerk of the United States District Court, and receipted for by *K. Loew* deputy clerk, "to be disposed of as the court directs."

See the said receipt on file as evidence.

On the twenty-seventh of March, 1865, the court rendered a decree of distribution, by which the proceeds of the sale of the condemned property were apportioned among the State of Louisiana, the city of New Orleans, the officers of the court, and E. A. Bradford.

The foregoing is an impartial statement of all the essential facts of the case, and by the light of these facts, we will examine the issues raised by the pleadings, and assignment of error, of the defendant and plaintiff in error.

He sets up, in the first place, that we have no title which could justify us in pursuing him for the recovery of the lots above described. But, conceding such a right in us, he sets up in the second place, that before we can divest him of possession, we must refund him the sum of $6000, paid by him at the Marshal's sale.

The pretense that he acquired a fee simple estate in the

property by the confiscation sale, we will not discuss, in this Court, where it is no longer an open question.

The suggestion that the sale of the lots by the Marshal was provoked by the mortgage creditor, Bradford, a mere intervenor, and hence, that in some incomprehensible way, something was bought, that was not sold, is hardly worthy of a respectful consideration.

The order of sale was made at the instance of the United States, in virtue of a judgment in favor of the United States, *and one month before the decree, recognizing Bradford's right as a mortgage creditor, was rendered.*

The sale, therefore at which plaintiff in error was the purchaser, was a sale in which the right and interest of the United States, and of the United States alone, were adjudicated. He bought that right and interest, and possessed and enjoyed them until their lease of life expired, that is, for over eleven years, until the death of Hays and for over six years he has continued to hold the property as a mere trespasser, since that event.

But, says the plaintiff in error, I must, at all events, have back the $6000 I paid to the United States. Why? Because the money was afterwards distributed by the court to mortgage and privilege creditors, whose liens upon the property were thereby released.

How does this concern the plaintiff in error? What business is it of his who got the purchase money, so that the vendor and creditors were satisfied, and so that he received the thing which he had purchased?

When he paid his purchase money, the United States was the sole recognized claimant for it. If that money had gone into the treasury; if no prior liens had been recognized, would plaintiff in error have been entitled to demand that it should be refunded, when, by the death of Hays, his life title ended?

If so, where would be the government interest?

The life estate ended, the property would revert to the heirs.

Mr. Waples would receive back his $6000.

He would have had the possession, use and revenues of the property for nothing for over eleven years.

The whole proceeding would have been for his sole benefit.

Is not this proposition ridiculous as it seems, when stated, precisely what the plaintiff in error contends for now?

Does he not ask for the absolute return of the purchase money, after he has had the use and enjoyment of the thing sold, to the full extent, and up to the termination of his title?

The intervenor, Bradford, is not here complaining; probably he did not receive the full amount of his mortgage from the proceeds of the sale; perhaps his heirs may yet have some claim against the estate of Hays. But how does this concern the plaintiff in error?

If Bradford had not intervened, and had not received the proceeds of the sale, he might possibly have preserved his mortgage rights against the heirs of Hays, but after the confiscation and sale of Hays' life interest therein, he could never have enforced his mortgage to the prejudice of the life estate, which the plaintiff in error purchased.

The plaintiff in error attempts to argue that the property was actually sold to satisfy Bradford's mortgage, and therefore he either acquired a valid title, or failing that, is entitled to a return of his purchase money.

But this is conspicuously not so.

If Bradford had foreclosed his mortgage before the United States libeled the property, and had procured its sale to satisfy his lien, of course the title would have passed forever from Hays and his heirs. But he did not foreclose. Perhaps he was satisfied with his security, and preferred to wait until General Hays returned to his home.

He took no step whatever, until some three months after the United States had libeled the property, and when he filed his

intervention at that time, he made no opposition (and he could have made none) to the confiscation of the property, but simply asked that the proceeds should be applied to the payment of his claim (page 23, Record).

This claim was stoutly resisted by the United States, in an answer filed by the District Attorney (*no less a person than the plaintiff in error himself*) which is to be found at page 27, Record.

This answer, if it shows nothing else, shows conclusively that the *plaintiff in error* knew (better than any one else) when he purchased the property, that the sale was in no manner provoked by the mortgage creditor.

All the issues in this case have been passed upon by the Supreme Court of Louisiana, in the case of Pendegast, Adm'x., vs. Schawtz et al., reported in 30th Louisiana Annual, part I, page 590, to which we respectfully ask the attention of your Honors. The court say: "The defendants claim, in any event, that the succession should be compelled to repay to them the amount of a mortgage existing against the property at the time of the confiscation sale, and which is claimed to have been reserved and paid out of the price of the purchase. They claim also the value of certain necessary repairs, put down in the brief of counsel at $325, for thirteen years, and also the taxes during their possession, since the confiscation. As to the claim to be repaid, the amount of the mortgage, it is sufficient to remark that it was paid not in addition to, but out of the purchase price, which would otherwise have gone entirely into the hands of the Marshal, and that they paid no more by reason of the existence of the mortgage than they would otherwise have done. Their bid was regulated by the value of the right in the property belonging to Pendegast, which was subject to the mortgage, and the whole amount of that bid was the consideration for the life estate or usufruct acquired by them, the duration of which depended on the uncertain event, the death of Pendegast. To repay the mortgage debt would be to return to the defendants the very consideration which they paid for the enjoyment of the property

during all these years. Had they paid it otherwise there might be some pretext for its restoration; not so, however, when it was only paid out of the price, which was in no manner increased thereby.

The fact that the mortgage creditor instead of the government was allowed, without contest by the latter, to receive so much of the price bid, by virtue of a pre existing right, is no more reason for its repayment than for that of any other part of the purchase price. As to the claim to re-imbursement for necessary repairs and taxes, these are charges imposed upon the usufructuary by the express provisions of the law, C. C. 570, 571 same, 578, and can afford no basis of claim by the defendants against the plaintiff. As to the statement of account, pro and con, in the defendants' brief, accepting the figures as correct, it would only prove that had Pendegast lived longer, the defendants' rights, acquired at the confiscation sale, would have been more valuable because longer enjoyed.

The case really seems too plain for argument, and presents no point that has not been finally adjudicated.

Assignments of Error.

We will briefly notice the assignments of error, made in the brief of the plaintiff in error, and found in the bills of exception.

First.—Suppose we concede that Bradford *could*, by way of intervention, have required the property to be sold in fee, yet as a matter of fact, he did not do so. But could he have done so by intervening in a suit which only undertook to sell Hays' *life interest?* He could not, by intervention, require a plaintiff to sell *more than he had seized* or could seize. All that he could have claimed would have been, that whatever part of the property remained after the rights seized by the United States had been sold, should continue to be subject to his lien. Nothing was sold but that which was seized by the United States. Nothing was acquired by Waples but that which was sold. It

is clear that the court ordered nothing to be sold except that which was confiscated by its decree.

No reference is made in the judgment *quoad* Bradford, except to recognize his lien upon the proceeds of what was sold.

The property was not sold under Bradford's intervention, nor was it ordered to be sold to *satisfy his claim*. He was merely authorized to file his intervention, and was given the proceeds of what the United States had confiscated, and not the proceeds of what had been mortgaged. He asked only this in the prayer of his intervention.

Second.—Bradford's intervention as authorized by the act of March 3d, 1863, was in no sense an hypothecary action. On the contrary, it was a full recognition and acceptance of the rights and process of the United States.

He consented that the life estate should be condemned and sold, merely asking that his lien should be satisfied out of the proceeds of that sale.

He received the proceeds and has never complained. Why should the fee have been given up when the debt was discharged by the sale of the usufruct?

The United States were not bound to exhaust the property to pay the mortgagee. The proceeding was not under the law of Louisiana, but under the Confiscation Act, and, under that act, the United States could only sell what was condemned for confiscation, i. e., the life estate of Hays.

The property was not sold to satisfy the judgment of Bradford.

Third.—We have already answered the two first paragraphs in detail.

The rulings of the Judge *a quo* are in strict accordance with the settled jurisprudence of this court.

In answer to the third paragraph of this assignment, it is sufficient to say, that plaintiff did not "pay a mortgage debt in

a judicial proceeding," as claimed. He paid for property which he received, and of which he has had the full possession and enjoyment. He paid the United States for property which belonged to that government, by judgment of forfeiture and condemnation, and it is no business of his, what disposition the government has made of the purchase price.

Fourth.—The matters set forth in this assignment have been fully discussed under other heads.

Fifth.—The claim of error here assigned is, that the title deed of the property to Hays ought not to have been received in evidence, because the title was not sufficiently set forth in the petition, and because the deed was not attached to the petition as required by article 174, Louisiana Code of Practice, and because the petition does not describe the land sued for.

Also, that the heirs of Hays sue upon an extinguished title, and claim property which they allege has been forfeited to the United States.

The fundamental vice of the argument of the plaintiff in error lies in the assumption that something was sold, which in reality was not sold. If the fee could have, and actually had been seized, confiscated and sold, then the argument would be sound; but since the fee was not seized, nor confiscated, nor advertised for sale, and hence was not sold, and could not have been, it follows inevitably that the purchaser at the Marshal's sale did not acquire it.

Take an illustration:

Suppose a debtor has the life usufruct in a property, on which a certain creditor has a mortgage; suppose an ordinary creditor gets a judgment and seizes and sells the usufruct. The mortgage creditor, whose debt was due, might intervene and claim the proceeds of the usufruct as an incident of his right, but that fact would not give the purchaser of the usufruct anything but the usufruct. He could not claim the *fee* in the property under a sale of the mere usufruct.

The analogy which is sought to be drawn from the Louisiana cases, where second mortgagees have provoked the sale of property, is fatally vicious, because the rights of second mortgagees embrace the fee so that a sale made by them disposes of the fee, whether they receive any portion of the proceeds or not; whereas, in this case the rights of the United States rested only upon the usufruct of which alone it could provoke the sale.

Plaintiff in error raises a technical question of Louisiana practice, on the ground that the act of sale to Hays was not annexed to the petition, quoting Article 173 of the Louisiana Code of Practice.

The objection is as puerile as technical, because the Supreme Court of Louisiana has expressly decided that the only right given to defendant, because of the failure of plaintiff to annex the act of sale to his petition, is that he may refuse to answer until the act has been annexed, and may except (demur) to the petition.

See 2d Louisiana Reports, 133; 14th Louisiana Annual, Reports, 621.

Waples waived this by answering without reservation.

(Page 3. Record.)

The sixth assignment has been fully discussed under other headings. The judgment in favor of Bradford, and the judgment in favor of the United States, only affected the life interest of Hays.

The right of action of Hays' heirs only dates from his death. This suit was instituted within a few months after that event, and, of course, is not barred by prescription.

We respectfully ask that the judgment of the lower court may be affirmed.

B. F. JONAS,
R. T. MERRICK,
Of Counsel.

OFFICE SUPREME COURT U. S.
APR 8 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the U. S.

No. 296.

OTIS BIGELOW, Appellant,

vs.

GEORGE A. ARMES, Appellee.

Appeal from the Supreme Court of the District of Columbia.

Brief of S. S. HENKLE, for Appellant.

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OFFICE SUPREME COURT U. S.
APR 8 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the U. S.

No. 296.

OTIS BIGELOW, Appellant,

vs.

GEORGE A. ARMES, Appellee.

Appeal from the Supreme Court of the District of Columbia.

Brief of S. S. HENKLE, for Appellant.

Supreme Court of the U. S.

OTIS BIGELOW,
Appellant.

vs. No. 296.

GEORGE A. ARMES,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF S. S. HENKLE FOR APPELLANT.

Statement of the Case.

Armes filed the bill against Bigelow to enforce the specific performance of a contract to exchange lands.

He claims that on the 22d of November, 1876, he entered into a contract with Bigelow, by which he agreed to sell his house on 8th street, in this city, to Bigelow, subject to an encumbrance for $2,000, for a farm in Fairfax Co., Va., and a house and lot on Delaware avenue, in this city, and $525 in money. And that the following pencil memorandum of the trade was made and signed at the time, viz:

"NOVEMBER 22, 1876.

I propose to give my house on 8th street, subject to $2,000, for one house on Delaware avenue, and one farm in Fairfax Co., Va., and $525 cash.

Accepted, OTIS BIGELOW." GEO. A. ARMES.

He also claims that of the $525 Bigelow paid him $500 and gave him possession of the Delaware avenue house, and that he gave him an old title deed showing the description of the lot, and also gave him some old deeds of the Virginia land, showing description. He also claims that he repaired the Delaware avenue house. He claims that he delivered the deed of his property to Bigelow November 24, 1876, but with the understanding and agreement that Bigelow was not to record it until he delivered to Armes his deeds. He also claims that Bigelow has fraudulently destroyed the memorandum, and that Bigelow has admitted Armes was the owner of the Delaware avenue house.

Armes was a real estate broker. Bigelow was a banker. Bigelow admits that Armes called at his office about the middle of November, 1876, and he told Armes he had several small pieces of property that he wished to exchange for a larger one, and that he showed Armes at least two of his small city properties, and showed him papers containing descriptions of several Virginia farms. He admits that Armes called again on the 22d of November and urged an immediate trade, which he declined, but said if Armes would examine his property and give him time to examine his, he would make a fair trade with him. That Armes took a piece of paper and wrote a pencil memorandum, viz: "November 22, 1876—I propose to give my house on 8th street, subject to $2,000, for one house on Delaware avenue, and one farm in Fairfax Co., Va., said house to be put in good repairs and condition, or $650 cash." Bigelow did sign it, but says he did not consider it a contract and tore off the signatures and threw it in the waste basket. He says he afterwards took it out of the waste basket to show it to the court, because Armes threatened him with a

suit. He admits that he gave Armes $500, but denies that he gave it to him upon the contract, but says he loaned the money to Armes to meet pressing necessities at his urgent request, and took his deed as security and not in execution of the agreement. He admits he gave Armes the key to the Delaware avenue house, but says he gave it to him to have it repaired, as Armes told him he had a man who owed him whom he could get to do it. He asked it as a favor. Bigelow afterwards got the key and had ever since been in possession of the house. He admits he authorized Armes to rent the house, but he gave it to him to rent as a real estate agent and not as owner. He denies utterly that he gave him possession of this house in execution of the contract, or that he did any other act or thing in part performance of the contract, or that there ever was any contract between him and Armes, either verbal or written.

Upon the final hearing at the Special Term, the court made a decree dismissing the bill, upon which decree the plaintiff below appealed to the Court in General Term. Upon the hearing in General Term, the decree of the Special Term was reversed, and the decree found on pages 48-9 of the record, was rendered against the defendant below. From which he appealed to this court.

Assignment of Error.

The Court in General Term erred in not affirming the decree of the Special Term dismissing the bill, and in rendering a decree for specific performance against appellant.

Argument.

I have been at a loss to determine exactly what the scheme of the bill is—whether the plaintiff below intended to ask the specific enforcement of the contract

set up in the pencil memorandum, or sought the enforcement of an independent parol contract upon the ground of part performance and introduced the memorandum in aid of the parol agreement. The bill, in sec. 3, professes to set out a contract of exchange, and sec. 4 says, "at the time of said transactions an informal memorandum was made with a lead pencil, showing in general terms substantially the facts above set forth, excepting as to the minute description of the property, and was signed by said plaintiff and the said Otis Bigelow," and no other contract at any other time is alleged. So that whatever the design of the pleader may have been, I take it that the purpose of the bill must be construed to be the specific enforcement of the pencil memorandum.

REQUISITES OF A VALID MEMORANDUM UNDER THE STATUTE OF FRAUDS.

"Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent," says this court in Williams vs. Morris, 95 U. S, at 456.

First Baptist Church vs. Bigelow, 16 Wend., 28;
Bailey & Bogert vs. Ogden, 3 John, at 419;
Hinde vs. Whitehouse, 7 East, at 570;
Morton vs. Dean, 13 Met., 385;
Brodie vs. St. Paul, 1 Ves. jr., 326;
Blackburn on Sales, p. 49-56;
Davis vs. Shields, 26 Wend., 341;
Wright vs. Weeks, 25 N. Y., 153.

Armes and Bigelow differ as to what the memorandum contained, but assuming that it was as claimed by Armes, it will hardly be pretended that the essential terms of the contract can be made out from the writing itself.

Could a Court of Equity specifically enforce it without the aid of extrinsic evidence? Let us see.

What kind of a title is Armes to make Bigelow for his house on 8th street. Is it a fee simple or is it a life estate, or a leasehold? The terms of the writing would cover either of these. You may not infer that it was a fee, for Armes may not have owned the fee, and the court cannot act upon presumption, as the Supreme Court says: "The proof as to the terms of the contract must be *clear, definite, and conclusive.*"

Again, is it simply the house that is to be given, or is it the *ground* as well? If the latter, how much ground? Is it the ground simply which the house stands on, or half an acre?

What is the $2,000 encumbrance? Is it a mortgage payable in a year, or is it on interest in perpetuity to the extent of $2,000 held by some third person, or does Armes reserve this $2,000 for himself? This is the most definite part of the writing.

Now, what does he propose to give his house for: one house on Delaware avenue, and one farm in Fairfax county, Va., and $525 cash.

Where is Delaware avenue? Is it in Washington or in New York, or in San Francisco? What manner of house is it? Does the ground go with it? If so, how much?

A farm in Fairfax county, Va. Here the county and State are given, but all else is unknown. The character of the title, the quantity of land, &c., are all left to be supplied by parol proof; and without such proof it will not be pretended that a court could locate this farm, fix the quantity of land, or determine the character of title to be conveyed.

Nor does the memorandum itself contain a reference to any other writing or thing, by which it may be enlightened.

Again, where land is bargained for, the settled doctrine both in England and the United States is, that the *writing* must so describe the land, that it may be identified, or must contain a reference to some external standard which fixes and describes it.

Brown on Statute of Frauds, 3d Ed., p. 402, sec. 385, and authorities cited;
Ferguson vs. Stover, 33 Penn. St., 411;
Soles vs. Hickman, 20 Penn St., 180;
Ides & Smith vs. Farrow, 7 Rich. Eq. (S. C.), 378;
Grafton vs. Cummings, 99 U. S., 100;

In Barry vs. Combs, 1 Pet., 640, says the Supreme Court: "We are, therefore of opinion that the ambiquity is fully removed, and legally, *since it is by reference to a medium of explanation suggested on the face of the memorandum*, and in evidence, which, while it neither adds to, detracts from, nor varies the note in writing, supplies every exigency of the Statute of Frauds."

In the late case of Williams vs. Morris, 95 U. S., the written memoranda were much more definite in their descriptions of the property than is this (see p. 445), and yet this court says (p. 455): "Decided cases every

where require that the memorandum should mention the price. Nothing is contained in either receipt to fulfil that requirement, nor do the receipts contain anything of an unambiguous character to enable the court to determine what real estate is the subject of the purchase." In that case there is such a description of the property as indicates its location, but here there is no semblance of a description.

Viewed in every possible aspect, the memorandum in this case is totally insufficient to support a bill for specific performance.

If this, then, be a bill to specifically enforce the written contract, the case must stand or fall upon the writing *itself*, and cannot be aided or supplemented by parol proof of the acts or declarations of the parties, antecedent, contemporaneous or subsequent to the making of the memorandum, and all the parol testimony of the acts and declarations of the parties is irrelevant and incompetent.

Here, I think, I might safely rest, but the appellee claims to have performed the contract on his part by conveying his property to appellant, who holds it, and refuses to comply with the contract on his part.

There is no such thing known to equity jurisprudence as a bill for the specific performance of a *written* contract on the ground of *part performance*—as we have seen the *writing* must rest upon its own merits. If valid it does not need the aid of part performance; if invalid it will not be cured by it.

It is true that *part performance* is one of the grounds upon which equity will avoid the Statute of Frauds, but

that is part performance of a *parol, not a written contract.*

Fry in Specific Performance, pages 225–6;
Williams vs. Morris, 95 U. S., at 457.

A written memorandum signed by the party to be charged, is a *compliance* with the statute, and needs no aid from extrinsic circumstances, but a *parol* agreement affecting lands is *void at law,* and is only cognizable in *equity* where it has been partly performed.

Where there is a contract in writing, the party seeking specific enforcement, will not be permitted to ignore the writing because it is insufficient under the statute, and prove a contract by parol supplying the defects of the writing, as a foundation for proof of part performance of the agreement.

When the parties have put their contract in writing, the law conclusively presumes that it contains the whole agreement; and parol proof can only be introduced to explain ambiquities—and this whether the writing be sufficient or insufficient under the Statute of Frauds.

The 4th paragraph of the bill avers that the memorandum was made at the time of the agreement, and sets it forth in general terms, except the minute description of the property, and that it was signed by both parties. The 7th paragraph of the bill says: "when said memorandum of said agreement was made it was entrusted to the possession and care of said Otis Bigelow, who stated in substance that he would keep it safely; but said Bigelow now informs the plaintiff that he has not it; and that "he tore it up and threw it into the waste-basket; and the plaintiff charges that the conduct of the said Otis Bigelow in thus disposing of said

memorandum, was fraudulent in its character, and that that the paper was so torn up and disposed of with the fraudulent intent and purpose on the part of said Otis Bigelow, to delay, hinder, and defeat the plaintiff from maintaining his rights in the premises." And no other agreement is set up or pretended to have been made than that contained in the written memorandum.

I am, therefore, at a loss to conceive upon what theory a specific performance of a parol agreement upon the ground of part performance can be predicated of this bill.

In the court below the appellee relied upon the written memorandum as the evidence of his contract. On the 1st page of his printed brief in the General Term, he says: "The denial of the defendant that any trade was made, is met by the memorandum of November 22, which it is admitted, was signed by both parties. The law (therefore) attaches a force to the writing which the evidence of the parties cannot overthrow." "Old title deeds were delivered as descriptive of the property."

"These papers show an entire contract."

See also testimony of Charles H. Armes as to memorandum on page 16, rec., and the testimony of appellee on pages 21 and 22, rec.

But supposing there had been no written contract, has the appellee made such proof of a parol contract, and part performance of it, as to entitle him to a decree for a specific performance?

In the case of Purcell vs. Miner, 4th Wall. 513, this court has defined with great force and clearness the conditions which will enable a Court of Equity to specifically enforce a parol contract respecting lands; and this case, it

will be observed, was like the case at bar, a contract for the *exchange* of lands.

Says the court:

"A mere breach of a parol promise will not make a case for the interference of a chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him. He knows that the law requires written evidence of such contracts in order to their validity. He has acted with great negligence and folly; has paid his money without getting his deed. When he requests a court to interfere for him, and save him from the consequences of his own disregard of the law, he should be held rigidly to a full, satisfactory, and indubitable proof—

First. Of the contract and of its terms: Such proof must be clear, definite, and conclusive, and must show a contract, leaving no *jus deliberandi* or *locus panitentiæ*. It cannot be made out by mere hearsay or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation, which the witness had no reason to recollect from interest in the subject matter, which may have been imperfectly heard or inaccurately remembered, perverted, or altogether fabricated; testimony, therefore, impossible to be contradicted.

Second. That the consideration has been paid or tendered. But the mere payment of the price in part, or in whole, will not, of itself, be sufficient for the interference of a Court of Equity, the party having a sufficient remedy at law to recover back the money.

Third. Such a part performance of the contract that its rescission would be a fraud on the other party, and

could not be fully compensated by recovery of damages in a court of law.

Fourth. That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession."

In order, then, to justify the specific enforcement of a parol contract, there must be present these four conditions, viz:

1st. Clear, definite, and conclusive proof of the contract.

2d. Payment or tender of the consideration.

3d. Such a part performance that the rescission would be a fraud on the other party, and could not be fully compensated by a recovery of damages in a court of law.

4th. There must have been delivery of possession made in *pursuance of the contract*, and *acquiesced in by the other party.*

Let us see how far these requirements are found in this case.

1st. As to the proof of the contract, leaving out of view the written memorandum.

The appellee and his brother are the only witnesses, who testify in his behalf to the making of the contract,

The appellee says, p. 21· "I asked my brother to go with me into the bank, as I was about making a trade with Mr. Bigelow," etc. "We then went into the back room of the bank, and after an hour or two discussion, Bigelow finally agreed to give me the farm alluded to, and a house on Delaware avenue, assume the $2,000 incumbrance on my 8th-street house, pay me $500 in cash, and put his house in good repairs." He then gives an account of their putting it in writing, and the change made in it as it was being written.

The statement of the contract by Charles, on page 15, is quite as indefinite. Neither contains a description of either of the properties proposed to be exchanged, by which they could be found or identified.

It will hardly meet the requirement that the proof shall be "*clear, definite, and conclusive.*" On the contrary, it is about as muddy, indefinite and inconclusive as you could make it.

Bigelow swears, in his answer, pages 7, 8 and 9, and in his examination as a witness, pages 26 and 27, that there was no contract at all, either verbal or written. He admits that he had conversations with appellee looking to an exchange, and the signing of the memorandum, but denies that he made any verbal contract, or that the memorandum was understood to be a contract, but only a proposal to become a contract in case upon an examination of each others properties thereafter, it should be satisfactory to each.

He also denies that Charles Armes was present upon the occasion when the memorandum was made.

George C. B. Rowan, book-keeper for Bigelow & Benjamin, page 34, says, that he was present, and he swears positively that Charles was not there.

There is at best a stand-off as to whether Charles was present at the making of the contract, with the *onus* upon the appellee, in a case where the evidence is required to be "conclusive."

It will be observed too, that while the evidence of the appellee and his brother is in the main substantially co-incident, they differ as the repairs on the Delaware avenue house. The appellee saying the house was to be put in "good repairs," and Charles not mentioning the repairs of the Delaware avenue house as a part of the verbal contract.

Charles Armes says, on page 16: "After the terms were verbally agreed upon, the plaintiff wrote with a pencil this "— and then he gives the discussion over the agreement as it was committed to writing, and finally the writing itself. From his testimony it would seem that there was no agreement about repairing the Delaware avenue house until the writing of the agreement had commenced, and it was then for the first time discussed, and when finally it was agreed to substitute money for repairs, it was put in the writing. After finishing the writing the witness says: "This was signed by the defendant Bigelow, who, after reading it, wrote upon it the word "accepted," and signed his name to it. He then handed it to me, saying, I suppose you want to keep this. I said, No, it makes no difference. I will entrust it to your care. He took it and said, Well, I will put it up here for safe keeping, indicating a place behind his counter."

The appellee agrees with his brother that during the writing the stipulation for repairs was changed to money. Appellee and his witness do not entirely agree as to what the verbal contract was, but they do agree that it was not completed until it was incorporated into the writing.

Upon the testimony offered by the appellee it is impossible to make out a contract independently of the memorandum.

The appellee sought to patch his ragged evidence of a contract, with admissions of Bigelow. Charles Armes says, that Bigelow paid him interest upon the incumbrance upon the 8th-street house. (The incumbrance was held by Armes' father, and Charles was his attorney.) And that Bigelow took out a policy of insurance upon the 8th-street house. This Bigelow admits, but says he took out the policy to protect his

security, and he paid the interest with the rents which were given him for that purpose.

Armes also proves by one Cajay that Bigelow told him he had sold a house on Delaware avenue to Armes, and he also exhibits an order from Bigelow to Cajay to pay Armes the rents; and in the order he describes Armes as the owner of the house.

Armes testifies that Bigelow gave him possession of the Delaware avenue house, and that he advertized it for rent. Bigelow admits that he gave Armes the house to rent, but as a real estate agent, and not as owner.

He also admits that he authorized Armes to repair the house, but says Armes asked it as a favor, saying he could have it done by a man who owed him, and he could thereby save a debt.

Armes never did rent the house, but Bigelow afterwards took charge of it himself. He says it was never out of his possession from the time he bought it.

It is not pretended, however, that Bigelow ever gave Armes possession of the Virginia farm, or offered to.

This testimony is all of the class of evidence, that this court, in Purcell vs. Miner, says will not do for this kind of a case; and it is all reasonably explained or contradicted.

But whatever view the court might take of this testimony, if it were a mere question of weight or preponderance, it is perfectly certain that it does not fulfil the requirements of the law as laid down by this court for a case like this. It must be "clear, definite, and conclusive."

I will consider the 2d, 3d and 4th requirements together, viz., payment of the consideration, part performance and delivery of possession.

It is admitted that the appellee did convey his house to the appellant, and that he accepted the deed; but it was not in *execution of the contract*. The testimony of the appellee and appellant and Charles Armes all shows that it *was not so delivered*. The appellee says in his testimony (p. 22,) "On or about the 24th of November, I signed the deed; my wife and I signed the deed of the 8th street house to Otis Bigelow; I told him that I had a note due in bank, and if he would let me have $400 *I would give him my deed to hold until his wife returned, on condition he would not record it*; so he gave me $400 and agreed not to record my deed, ordering at the same time the clerk to make out the deed of his property to me, which he stated would be handed to me immediately on his wife's return to the city. The next day I called and asked him if he could spare another $100. He at once handed it to me," &c.

Charles Armes says (on p. 18:) "At a previous interview with Mr. Bigelow, I asked him in effect, why he had recorded the deed from the plaintiff, as I understood that he had agreed not to record it until he delivered his deeds of the house on Delaware avenue and the farm in Virginia. He said that the plaintiff had requested him not to record it, but that he did not tell the plaintiff that he would not. He said he had paid the plaintiff $500, and that he had nothing to show for it, and he did not feel safe without putting the deed on record," and on p. 19, he says Bigelow said "to me that he recorded the deed because he considered it necessary on account of his having paid the $500. He said the law of the District allowing six months for recording deeds gave the plaintiff the power to sell it to somebody else; that he therefore thought it necessary to place it on record." In paragraph 3 of Bigelow's answer, he

sets out fully that the $500 was loaned Armes at his urgent solicitation and to meet pressing necessities, and in view of a possible trade, &c.

On page 27, Bigelow in his testimony, says he loaned Armes the $500 on the security of his deed, and on page 31 he says: 'This $500 was lent the plaintiff upon his urgent request to meet pressing necessity and had nothing to do with any trade whatever, and on page 27 he says he is ready to reconvey the property upon the payment of the $500 and interest.

If Armes delivered his deed to Bigelow in *pursuance* of the contract why should he have stipulated that it should not be recorded? If he was executing the contract it could have made no difference to him.

The testimony of Ames himself shows conclusively that he delivered his deed as a security for the money loaned him.

But if he had testified unequivocally that he delivered his deed in *execution* of the contract, it is unequivocally and emphatically denied by Bigelow; and the testimony of Charles Armes only shows that his understanding was that Bigelow had no right to record the deed; and this sustains Bigelow, because if the deed was delivered in execution of the contract he had a right to record it.

The testimony of Armes shows that his necessities pressed him for money in advance of the time when the contract was to have been consummated by the exchange of deeds.

And he accordingly executed his deed and took it to Bigelow and told him of his need of money and proposed to deliver his deed if he would advance him the

money he wanted, $400, stipulating only that Bigelow should not record it until he delivered his deeds to Armes.

Can anything be plainer than that Armes did not intend his deed to be considered as *delivered upon the contract* until he got Bigelow's deeds?

Bigelow says it was a loan on the security of the deed simply, and the *onus* of making *conclusive* proof is upon Armes.

Assuming that there was a contract by parol, it was inchoate, and there remained to either party the *jus deliberandi* and the *locus penitentiæ* until the exchange of deed consummated it.

Before the time for this arrived Armes solicited Bigelow to advance him $500, and proposed to secure him by delivering his deed, and Bigelow consented and gave him the money and recorded the deed to secure himself.

Concede that each party contemplated that the trade would probably be consummated—this transaction certainly didn't consummate it, nor did it take from either the *jus deliberandi* or the *locus penitentiæ*. Either was at perfect liberty to stop, without liability either legal or equitable, to the other at any time before the exchange of the deeds.

"The ground of the interference of a Court of Equity is not simply that there is proof of the existence of a parol agreement, but that there is *fraud* in resisting the completion of an agreement partly performed." "The acts of part performance must be *clearly referable to the contract*, and with a *direct view to its performance*, and the agreement set up must appear to be the same with the one partly performed. There must be no equivocation

or uncertainty in the case.

Philips vs. Thompson, 1 Johns. Chy., R. 1108.

There is some testimony by Armes and his brother that Bigelow showed them or gave them old title deeds to the Delaware avenue house, and the Virginia land, and that he gave Armes the key to the Delaware avenue house, &c., but these do not constitute acts of part payment.

"It is settled that acts merely ancillary to an agreement are not to be considered part performance. Such as the delivery of abstracts, giving directions for the preparation of deeds, and even the solicitor taking notes and preparing conveyances; going to view the estate, fixing upon appraisers to value stock, or making valuation, measuring lands, executing and registering deeds not accepted by the purchaser. These acts tend to show a treaty, but do not prove an agreement executed."

Brown Stat. of Frauds, Sec. 460.

The only act set up in the bill or shown in the proof, that could possibly be treated as a part payment, is the delivery of the title of the appellee to the appellant, and the only witnesses to the terms upon which that was done, are the parties to the suit.

In any view, Armes fails to make his case, because Bigelow contradicts him, and he is not supported by any other witness, and this independently of the "clear, definite and conclusive proof," which this court requires in cases of specific enforcement of parol contracts for the sale or exchange of lands.

It is not fraudulent in Bigelow to hold the appellee's title, as he took it as a security for the loan, or an advance of money in contemplation of a contract which

was never consummated. And he testifies that he had always been ready and willing to re-convey the property upon repayment of his money.

By the agreement set out in the Bill, and attempted to be proven, Bigelow ageed that his wife, when she returned from Europe, should join him in the execution of the deeds to be made by him. His wife was not a party to the contract, and a specific execution, so far as she was concerned, would be impossible, except by her consent.

Part performance will not justify the introduction of parol proof to support a defective writing.

Brydell vs. Drummond, 11 East, 142.
Clinan vs. Cooks, 1 Schoales, Lefroy 22.

In this District it is not necessary to plead the Statute of Frauds, or set it up in the answer, unless the answer *admits* the agreement set out in the bill.

Ortz vs. Grove, 21 Md. 470.
Winn and Ross vs. Albert, 2d Md., Chy. 169.
Wiley vs. Walling, 1 H. and G. 268.

S. S. HENKLE,
For Appellant.